Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE
OCT 8 2009

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-085

OCTOBER TERM, 2009

Herby B. Heath, Jr. and Tina M. Heath	}	APPEALED FROM:
	}	
v.	}	Washington Superior Court
	}	
Bonnie E. Orr	}	DOCKET NO. 318-5-06 Wncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

In this personal injury action, plaintiff appeals from a jury verdict awarding her damages for past and future medical expenses, but declining to award any damages for pain and suffering. Plaintiff argues that the verdict is inconsistent. We reverse and remand.

The pertinent facts are as follows. The parties were involved in a car accident in October 2003. A two-day jury trial was held in December 2008. At trial, plaintiff presented the testimony of her treating physician, Dr. Sorenson, who testified that as a result of the accident plaintiff incurred a permanent injury to her facet joint in her lower back. Dr. Sorenson opined that plaintiff has persistent back pain from the injury and her sole treatment is radiofrequency ablation therapy—an expensive and painful procedure plaintiff endures once a year. Plaintiff presented evidence that her past medical expenses totaled $31,102.84, and that her future expenses, solely for the therapy, will be $892,002.

Defendant admitted liability for the accident, but challenged whether plaintiff's resulting ongoing injury and treatments were a result of the accident. Defendant presented the testimony of a medical expert, Dr. Levy, who testified that plaintiff's injury is the result of a preexisting arthritic condition. Dr. Levy's opinion was that the accident caused a lumbar strain and without the preexisting condition her symptoms would have lasted three to six months. Dr. Levy testified that he believed plaintiff was in pain, but that he thought it was caused by her preexisting arthritis. He also conceded that plaintiff's therapy was a painful procedure.

The jury awarded plaintiff $15,000 for past medical expenses, $60,000 for future medical expenses, and $0 for past and future pain and suffering. Plaintiff filed a motion for a new trial or additur, claiming that the jury's decision not to award any damages for pain and suffering was inadequate and inconsistent with the verdict awarding plaintiff compensation for past and future medical expenses.

The trial court concluded that an award of no pain and suffering was not unreasonable because the evidence "supported a finding that the injuries suffered by [plaintiff] in the accident merely aggravated a pre-existing arthritic condition which she would have suffered regardless, and that the treatment she is getting adequately addresses her pain." The court did conclude that

plaintiff was entitled to the full amount of her past medical expenses, but in response to a subsequent motion denied additur for the full amount of future medical expenses, explaining that "the need for and appropriateness of future treatments was hotly contested." Plaintiff appeals.

The trial court has discretion in ruling on a motion for a new trial. Smedberg v. Detlef's Custodial Serv., Inc., 2007 VT 99, ¶ 5, 182 Vt. 349. In evaluating the motion, we view the evidence in the light most favorable to the nonmoving party and will presume the trial court's decision is correct, id., but a verdict that is the result of jury compromise will not be upheld, Ball v. Melsur Corp., 161 Vt. 35, 44 (1993). To determine whether such a compromise occurred, the threshold question is "whether the jury could reasonably have calculated the damages awarded on the evidence presented." Ball, 161 Vt. at 44 (quotation omitted). On appeal, we will "defer to the trial court to determine issues of compromise as it is in a better position to determine the question." Id.

Plaintiff argues that the jury's verdict is inconsistent because it found defendant liable for plaintiff's injuries and thus awarded her compensation for medical expenses, but did not award any compensation for pain and suffering. Given that plaintiff's past and future medical expenses were to address the pain she was experiencing from her injury, we agree that the jury's verdict in this case cannot be reasonably supported by the evidence. "Where a jury awards future medical expenses that are explicitly intended to compensate a plaintiff for future pain alleviation but makes no award for future pain, suffering, anguish and loss of enjoyment of life, a new trial conditioned on defendant's acceptance of a reasonable additur will generally be proper." Wetmore v. State Farm Mut. Auto. Ins. Co., 2007 VT 97, ¶ 10, 182 Vt. 610 (mem.).

Although we agree with defendant that not every award for past and future medical expenses will be inconsistent with no award for future pain and suffering, see id. ¶ 9, in this case the jury's verdict cannot be reasonably explained. Even when viewing the evidence in the light most favorable to the verdict, we conclude that the internal inconsistency cannot be explained given several key facts that were not contested at trial: first, plaintiff is in pain; second, her future medical expenses are solely to treat the pain; and third, the treatment for her pain is a painful procedure. Given these facts, we disagree with the trial court's explanation that the jury's verdict was reasonable because defendant proffered evidence that the accident "merely aggravated a pre-existing arthritic condition." The jury's decision to award future medical expenses indicates that the jury found that plaintiff's injury was caused by the accident, not a preexisting condition. Having found that defendant caused plaintiff's injury, and that this injury required future treatment for pain, there is no explanation for the jury's decision to award $0 for pain and suffering. See Smedberg, 2007 VT 99, ¶ 9 (concluding that jury's verdict was inconsistent where the jury found the defendant liable for back and neck injuries and cost of invasive surgery, but awarded $0 for pain and suffering); see also Brooks v. Brattleboro Mem'l Hosp., 958 F.2d 525, 530 (2d Cir. 1992) (concluding verdict inconsistent where jury found the defendant's negligence resulted in the plaintiff's injury and caused all of her medical expenses, but awarded zero damages for the plaintiff's contemporaneous, undisputed pain and suffering).

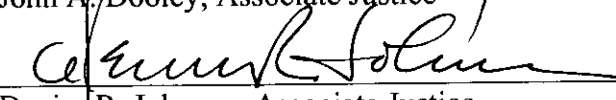
Similarly, the court's statement that the jury could have found that plaintiff's treatment adequately addresses her pain does not explain no award for pain and suffering. If the treatment abates plaintiff's pain for some period of time, that may reduce an award for pain and suffering, but it should not extinguish it, especially where the undisputed evidence was that the treatment is done solely to alleviate pain and that the procedure itself is painful. See Smedberg, 2007 VT 99, ¶¶ 11-12. Thus, we remand for a new trial on damages contingent on defendant's acceptance of a reasonable amount of additur. See V.R.C.P. 59(a); Wetmore, 2007 VT 97, ¶ 10.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice



Denise R. Johnson, Associate Justice